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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 158.

THEODORE B. DRESCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

The petitioner begs leave to comment briefly on two contentions of the respondent in its brief in opposition to the petition for a writ of certiorari.

1. The respondent (Brief 14) attempts to answer the petitioner's proposition that present convertibility into money or its equivalent is an essential characteristic of taxable income by citing the Treasury regulation (Reg. 103, Sec. 19.22(a)-3) providing that, if a person receives as part of his compensation for services rendered "living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax." Its reliance on this single illustration illuminates the fallacy of its position.

Room and board are obviously the equivalent of money, and to the extent that the right to room and board is currently converted into actual use and consumption income is realized, but only to that extent. If an employee is entitled to room and board, but he prefers to provide his own, certainly he has derived no income.

There would be an analogy to the annuity contracts in question if an employer made a non-assignable contract to furnish quarters and meals to an employee in some future year or years. Clearly the employee would realize no taxable income until the period of actual use and consumption.

2. The respondent (Brief 17) in controverting the conflict of the decision of the Court of Appeals in the present case with *McEachern* v. *Rose,* 302 U. S. 56, and with *American Light and Traction Co.* v. *Harrison,* 142 F. (2d) 639, states the effect of those decisions and adds:

> "The right to make such an offset in other circumstances has been upheld. *Stone* v. *White,* 301 U. S. 532. Cf. *Bull* v. *United States,* 295 U. S. 247. See also *Rothensies* v. *Electric Battery Co.,* 329 U. S. 296, 299-300."

This seems to imply that "other circumstances" were present in this case similar to those in the *Stone* and *Bull* cases rather than to those in the *McEachern* case. The fact is otherwise. The *Stone* case involved different taxpayers and the *McEachern* case different taxes. This Court in the *Electric Battery Co.* case restricted the applicability of both the *Stone* and *Bull* decisions to cases involving similar facts.

The respondent (Brief 18) interprets the decision of the Court of Appeals as directing an offset of the 1940

overpayment only if the United States *is* entitled (not *was* entitled) to an income tax of equivalent amount for the year 1941. Whether the Court's opinion is to be interpreted as directing an offset regardless whether the statute of limitations prevents the assessment of a deficiency for 1941, or only if an assessment for that year is not barred, the *Stone* and *Bull* cases do not support the Court's decision. If the former interpretation is correct, the Court's decision is clearly in conflict with this Court's holding in the *McEachern* case that, where the same taxpayer and only the income tax is involved, a deficiency for a barred year may not be offset against an overpayment for a different year, because of the specific credit and refund provisions of the Internal Revenue Code applicable to the income tax. If the latter interpretation is correct the Court's decision is equally wrong, because of the same exclusively applicable credit and refund provisions. (I. R. C., Secs. 322, 3770, 3775, Appendix to petition, 22). The *Stone* and *Bull* cases both involved situations where no remedy apart from set-off was provided.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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August, 1950